IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 03-2393

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA, a federally recognized Indian tribe, HOMER BEAR, JR., individually and as Chairman of the appointed Tribal Council of Sac & Fox Tribe of the Mississippi in Iowa, and RENETTA PLANDER, individually and as the Acting General Manager and Casino Manager of Meskwaki Bingo•Casino•Hotel, a subordinate enterprise of the Sac & Fox Tribe of the Mississippi in Iowa,

Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA and PHILIP N. HOGEN, individually and as Chairman of the National Indian Gaming Commission,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
HONORABLE LINDA R. READE

BRIEF OF THE PLAINTIFFS-APPELLANTS HOMER BEAR, JR. AND RENETTA PLANDER

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants Homer Bear, Jr. and Renetta Plander are appealing to the United States Court of Appeals for the Eighth Circuit from a Ruling of the United States District Court for the Northern District of Iowa, Judge Linda R. Reade, denying their Application for Temporary Restraining Order or Stay of Administrative Action.

The district court improperly found that the Plaintiffs were required to exhaust their administrative remedies before bringing this request before the Court. A temporary restraining order or stay of the administrative action was appropriate based on the lack of due process afforded within the administrative process.

Given the complex and disputed nature of the facts and the many issues before the court, Appellants requests oral argument. Appellants further requests a period of 15 minutes to present their argument.

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JURISDICTIONAL STATEMENT

On May 14, 2003, the Plaintiffs filed an Application for Temporary Restraining Order or Stay of Administrative Action asking the court to stay the enforcement of and administrative order issued by the National Indian Gaming Commission pursuant to 25 C.F.R. section 573.6(a). Jurisdiction in the trial court was appropriate under 28 U.S.C. Sections 1331. On May 22, 2003, the Honorable Linda Reade entered an order dismissing the Plaintiffs' Application for a Temporary Restraining Order or Stay of Administrative Action based on an erroneous conclusion that the court was without subject matter jurisdiction based on the Plaintiffs' failure to exhaust administrative remedies.

Within thirty days of the final judgment by the district court, on May 23, 2003, Homer Bear, Jr. and Renetta Plander filed a notice of appeal. This Court's jurisdiction is based on Title 28 U.S.C. Section 1291, which provides for jurisdiction over final judgments from a United States District Court. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN DISMISSING HOMER BEAR JR'S AND RENETTA PLANDER'S APPLICATION FOR TEMPORARY RESTRAINING ORDER OR STAY OF ADMINISTRATIVE ACTION BASED ON LACK OF SUBJECT MATTER JURISDICTION.

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

Darby v. Cisneros, 509 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993).

Frost v. Corp. Comm'n of State of Oklahoma Seminole Tribe of Florida v.State of Florida, 11 F.3d 1016 (1994).

Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992).

5 U.S.C. § 704.

STATEMENT OF THE CASE

On or about April 30, 2003, the National Indian Gaming Commission (NIGC) issued a Notice of Violation to Alexander Walker, Jr., Homer Bear, Jr., and the Sac and Fox Tribe of the Mississippi in Iowa, notifying them that the NIGC believed them to be in violation of various provisions of the Indian Gaming Regulatory Act (IGRA) based on the Tribe's transfer of leadership, and thus operation of the casino, to persons not "recognized by the Secretary of the Interior" as a governmental authority or to "an entity licensed by the tribal government pursuant to NIGC's regulations." (App. P. 44).[1] On May 12, 2003, the NIGC issued a Temporary Closure Order to Alexander Walker, Jr., Homer Bear, Jr., Sac and Fox Tribe of the Mississippi in Iowa, and Renetta Plander ordering them to cease and desist from all gaming activity. (App. P. 54).

On May 14, 2003, the Sac and Fox Tribe of the Mississippi in Iowa, the Meskwaki Bingo, Casino, and Hotel, Homer Bear, Jr., and Renetta Plander (hereinafter referred to as "the Tribe") filed an Application for Temporary Restraining Order or Stay of Administrative Action asking the court to stay the enforcement of the closure order. (App. P. 12). The United States, in turn, filed a motion to dismiss the Tribe's motion and a Motion for Temporary Restraining Order, seeking to enforce the closure order. After a consolidated hearing on the

parties' respective requests for injunctive relief, the district court entered an order dismissing the Tribe's motion for lack of subject matter jurisdiction and granting the United States' request for a restraining order. (A1).[2] Addressed in this brief is Plaintiffs Homer Bear, Jr.'s and Renetta Plander's appeal from the district court's dismissal of their Motion for lack of subject matter jurisdiction.

STATEMENT OF THE FACTS

At the center of this legal controversy is an intra-tribal leadership dispute within the Sac & Fox Tribe of the Mississippi in Iowa. Pursuant to the Constitution and Bylaws of the Sac and Fox Tribe of the Mississippi in Iowa, Tribal leadership is vested in an elected body referred to as the Sac and Fox Tribal Council. (Supp. App. P. 3). The Constitution also sets forth procedures whereby the members of the Tribe, with the support of at least thirty percent of the eligible tribal votes, may require the Tribal Council to submit to a recall election, whereby any council member's term in office may be prematurely terminated. (Supp. App. P. 7).

In the fall of 2002, reports of a series of illegal and/or unethical acts by the then Tribal Council caused greater than thirty percent of the members of the Tribe to invoke the above provision of the Constitution and sign a petition demanding the

[1] Plaintiffs Homer Bear and Renetta Plander join in the Appendix of the Sac & Fox Tribe of the Mississippi in Iowa (Appointed Council) and Meskwaki Bingo, Casino and Hotel, Volumes I and II. Plaintiffs Bear and Plander have also filed a supplemental appendix, to which a few citations are made.
[2] See Addendum.

Council hold a recall election. (App. P. 15-21; 88-401). The Tribe's legal counsel subsequently informed the Tribal Council that pursuant to the Tribe's Constitution it is required to hold the recall elections demanded by the tribal members. (Supp. App. P. 11). The Tribal Council (hereinafter the "Former Council") fired the Tribe's legal counsel and refused to respond to the will of the people and hold the Constitutionally mandated recall election.

In March 2003, in response to the Tribal Council's violation of the Tribe's Constitution and lack of enforcement mechanisms within the Constitution or otherwise, the hereditary tribal chief acted to reestablish the traditional governance of the Tribe. (App. P. 22-23). The Chief appointed a council, which would govern until such time as a new election could be held. Plaintiffs Homer Bear, Jr., Wayne Pushetonequa, Harvey Davenport, Jr., Ray A. Young Bear, Frank Black Cloud, Keith Davenport, and Deron Ward make up this appointed council (hereinafter "Appointed Council"). (App. P. 22-23). The Former Council, however, refused to relinquish leadership.

On April 1, 2003, in response to a query regarding the dispute from United States Representative Leonard Boswell, the Bureau of Indian Affairs issued a letter stating that the Interior that the Department of the Interior continues to recognize the elected Tribal Council led by Alex Walker, Jr. as the leadership of the Tribe. (App. P. 603). This letter was sent without any investigation or communication

with the Tribe. Subsequent attempts to communicate with the Bureau of Indian Affairs regarding the change in leadership with denied. The Bureau refused to review materials forwarded to it by Homer Bear, Jr., sending a letter dated April 9, 2003 stating that it refuses to "intrude on intra-tribal disputes." (Supp. App. P. 13).

On April 14th of 2003, the members of the Tribe held an election pursuant to Article IV, Section 2 of their Constitution, which provides:

> All members of the Tribal Council must be recognized as persons of honor, law abiding and of good character. The voting members of the Tribe shall be the sole judge of these qualifications.

(Supp. App. P. 3). Through this election, the Tribal members concluded that the members of the Former Council were not persons of honor, law abiding or of good character. The Tribe, as the "sole judge", effectively determined that no member of the present council met these qualifications and were precluded from further representation of the Tribe on or after the moment the votes were tabulated on April 14, 2003. (App. P. 23-24). A formal election to recall the Former Council and vote in the Appointed Council was coordinated to be held on May 22, 2003.

The Tribe's internal dispute results in a federal question based on the Tribe's operation of a gaming casino pursuant to the Indian Gaming Regulatory Act (IGRA). The Tribe operates the Meskwaki Bingo, Casino, and Hotel. As mentioned above, the NIGC issued a Notice of Violation and Temporary Closure Order based on the Bureau of Indian Affairs' statement regarding its recognized

leadership of the Tribe. The NIGC's correspondence provided that within thirty days after service of the Notice of Violation and Order of Temporary Closure, the named parties had the right to appeal to the full Commission or request a hearing with the NIGC. (App. P. 47). The Temporary Closure Order also provided a procedure for expedited review to the Chairman of the NIGC, if requested within seven days of the Order. (App. P. 56). None of the appeal provisions allowed for stay of the closure order during review of the agency's decision.

The casino accounts for nearly 100% of the Tribe's governmental revenues from non-federal governmental sources. (App. P. 27). The Tribe imposes and collects no taxes. (App. P. 27). Without the revenues from the casino, the Tribe's governmental, health, social, and welfare programs will not be able to operate. (App. P. 27). Closing of the casino will severely impact all areas of tribal governance, including health care, child protection services, youth and family services, educational services, senior services, and housing services. Closure of the casino for even a short period of time will result in substantial losses to the members of the Tribe.

SUMMARY OF THE ARGUMENT

The district court improperly found that the Tribe was required to exhaust its administrative remedies before filing an Application for Temporary Restraining Order or Stay of Administrative Action with the federal district court.

THE ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING HOMER BEAR, JR'S AND RENETTA PLANDER'S APPLICATION FOR TEMPORARY RESTRAINING ORDER OR STAY OF ADMINISTRATIVE ACTION BASED ON LACK OF SUBJECT MATTER JURISDICTION.

A. Standard of Review.

In evaluating the district court's decision with regard to subject matter jurisdiction, review of any factual findings is for clear error and legal conclusions de novo. Diggitt v. United Food and Commercial Workers Intern. Union, Local 304A, 245 F.3d 981, 986 (8th Cir. 2001); Appley Bros. v. United States, 164 F.3d 1164, 1170 (8th Cir. 1999). Review of the district court's decision to deny or grant an injunction is for abuse of discretion. Entergy, Arkansas, Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001). Finally, review of constitutional issues is de novo. Escudero-Corona v. I.N.S., 244 F.3d 608, 614 (8th Cir. 2001).

B. Legal Argument.

The district court determined that because the Tribe had not appealed the Temporary Closure Order, agency action was not final and the court lacked subject matter jurisdiction over the Tribe's request for a Temporary Restraining Order or Stay of Administrative Action. The district court decision was in error.

At the outset, the United States Supreme Court has recognized that the doctrine of exhaustion of administrative remedies is conceptually different from the doctrine of finality:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Darby v. Cisneros, 509 U.S. 137, 144, 113 S. Ct. 2539, 2543, 125 L. Ed. 2d 113 (1993) (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193, 105 S. Ct. 3108, 3119, 87 L. Ed. 2d 126 (1985)). The United States Supreme Court has provided that agency action is final if: (1) it is "the consummation of the agency's decisionmaking process," meaning that it is not tentative or interlocutory and (2) "rights or obligations have been determined" by the action or "legal consequences will flow" from it. Bennett v. Spear, 520 U.S. 154, 178, 117 S. Ct. 1154, 1168-69, 137 L. Ed. 2d 281 (1997).

In the case at bar, the decision of the NIGC ordering the closure of the Meskwaki Casino is a final order. The closure order requires that the casino be closed immediately, prior to any intra-agency review. See 25 C.F.R. § 573.6(b) ("The operator of an Indian gaming operation shall close the operation upon service of an order of temporary closure."). Even if the Tribe had requested review

by the agency, the casino would have been required to be shut down prior to a hearing, as there is no mechanism to stay the closure pending appeal. The very fact that the government sought enforcement of the order without waiting out the appeal period is evidence that it also believed the agency action to be final. Moreover, closure of the casino resulted in numerous members of the Tribe, including Plaintiff Renetta Plander, losing their jobs. It also results in tremendous loss of revenue to the Tribe, undermining the Tribe's ability to fund itself and its social programs. The order states a definitive position that inflicts an actual and concrete injury before any agency appeal process relief could be afforded. Because the Closure Order is final agency action, the Tribe is not required to exhaust administrative remedies before proceeding to court. See Bethlehem Steel Corp. v. E.P.A., 669 F.2d 903, 908 (3rd Cir. 1982) (nothing that agency action may be final despite a parties' failure to exhaust administrative remedies).

Even if the Court were to conclude that the Closure Order is not final agency action, as defined by the common law. The agency's action is nevertheless subject to judicial review without exhaustion of administrative remedies under the Administrative Procedures Act. 5 United States Code section 704 provides as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the

> review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. The United States Supreme Court has interpreted the last sentence of this code provision to mean that, under the Administrative Procedures Act, exhaustion of administrative remedies is a "prerequisite to judicial review only when expressly required by statute or when the administrative action is made inoperative pending the review." Darby v. Cisneros, 509 U.S. at 154, 113 S. Ct. at 2548 ("Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under § 10(c).").

Under the Administrative Procedure Act, the Tribe is not required to exhaust its administrative remedies prior to seeking judicial review. First, exhaustion of administrative remedies is not expressly required by the IGRA. It merely states that final decisions of the agency pursuant to section 2713, which includes the authority to require closure of a casino, may be appealed to the federal district court pursuant to the Administrative Procedures Act. See 25 U.S.C. § 2714. This is not an express requirement that optional appeals are exhausted prior to federal court action. Second, the agency did not fashion its order so that it remains

inoperative pending review. See 25 C.F.R. § 573.6(b). In fact, the NIGC did just the opposite, requiring that the casino be shut down upon issuance of the order, with no provision for stay pending appeal. Accordingly, pursuant to Darby v. Cisneros, imposition of an exhaustion requirement in this instance would be inappropriate. 509 U.S. at 154, 113 S. Ct. at 2548.

Finally, should the Court conclude that the finality doctrine and the Administrative Procedures Act do not allow for immediate judicial review, this situation, nevertheless, falls into one of the exhaustion of remedies exceptions. Exhaustion of administrative remedies is not required in a situation where, as here, the regulatory scheme is being challenged as unconstitutional and remedy thereunder is inadequate. McCarthy v. Madigan, 503 U.S. 140, 147, 112 S. Ct. 1081, 1088, 117 L. Ed. 2d 291 (1992); see also Moore v. East Cleveland, 431 U.S. 494, 497 n.5, 97 S. Ct. 1932, 1934 n.5, 52 L. Ed. 2d 531 (1977) (exhaustion of administrative remedies not required where the Tribe challenges constitutional validity of the regulation under which he or she is being charged). Pursuant to the Due Process Clause of the United States Constitution, "[n]o person shall . . . be deprived of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XI. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. Of Education v. Loudermill, 470 U.S.

532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 2d 865 (1950)). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved . . . ." Boddie v. Connecticut, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971). When the deprivation deprives the aggrieved person of the means of livelihood, the United States Supreme Court frequently held that the deprivation is indeed severe. Cleveland Bd. Of Education v. Loudermill, 470 U.S. at 543, 105 S. Ct. at 1494 (citations omitted). As the degree of severity of the deprivation increases, so to does the constitutional requisite for the hearing. When the deprivation may deprive a party of the very means by which to live (*e.g.*, welfare benefits, licenses, earnings), then due process is only satisfied by a procedure for pre-deprivation hearings. See Goldberg v. Kelly, 397 U.S. 254, 264, 90 S. Ct. 1011, 1018-19, 25 L. Ed. 2d 287 (1970). See also Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971) (noting that licenses are "essential in pursuant of a livelihood"). Simply put, the Due Process Clause mandates a meaningful hearing be conducted, Boddie v. Connecticut, 401 U.S. at 378, 91 S. Ct. at 786, and that said hearing be conducted prior to the deprivation.

In the present case, the administrative process deprives the Tribe of a substantial property right without due process. 25 USC section 2713, 25 CFR

section 573.6 and the closure order issued thereunder require that the Tribe "cease and desist from all gaming activity in the Meskwaki gaming facility" immediately upon service of the order, providing no opportunity to be heard before the closure and no mechanism for stay during the pendency of any appeal.[3] The closure of the casino has resulted in substantial loss in revenue both to the members of the Tribe, and to the individuals employees of the casino.

The Tribe is seeking a stay of the enforcement of the closure order because the Chairperson issued the closure order without providing the Tribe with any due process rights. The Tribe's requested injunctive relief is not based upon any intermediate agency action but rather from the unconstitutional procedure itself from which the issuance of the intermediate agency action flowed. As such, the fact the Tribe failed to exhaust agency action may not be utilized as a basis for dismissing the Tribe's action; there is simply no NIGC procedure designed to address the Tribe's complaint. The Tribe was completely and absolutely denied its constitutional right to be heard prior to the deprivation.[4]

[3] Conceivably review of the Notice of Violation could have been completed prior to the closure order. Review procedures of the Notice of Violation do not include an opportunity for an evidentiary hearing.

[4]. Plaintiffs do not intend to imply that the NIGC's notice of closure satisfied the notice requirement under the due process clause. The notice issues by the NIGC did not articulate why the Tribe was in violation of the pertinent statutes and regulations. The notice failed to identify any facts or evidence the Chairperson was relying in opining that the Tribe was in violation. Without such meaningful notice, it necessarily flows that there could be no meaningful hearing. City of West Covina v. Perkins, 525 U.S. 234, 240, 119 S. Ct. 678, 681, 142 L. Ed. 2d 636 (1999) (observing that primary purpose of the notice requirement under the due process clause is to ensure that the hearing conducted is meaningful).

The district court's determination that this exception to the exhaustion requirement is not applicable based on the Tribe's lack of protected property interest is in error. In drawing this conclusion the court states as follows:

> [T]he IGRA also sets forth the conditions under which Tribe must conduct its gaming operations and gives the NIGC the right to cease such operations upon a finding by the NIGC that the Tribe has failed to comply with the requirements set forth in the statute. Thus, the IGRA by its terms makes it clear that the right to conduct gaming operations is conditioned upon a tribe's willingness to conduct such operations in accordance with the statutory requirements and is subject to the NIGC's power to cease such operations upon a finding of noncompliance with the statute. The Court therefore finds that neither the Tribe nor the Appointed Council Plaintiffs can be said to have a protected property interest in the operation of its gaming operations under the IGRA, the revenues generated thereby or the government benefits and per capita payments made available by the generation of such revenues. Moreover, the Court finds that the Appointed Council Plaintiffs' claim that the NIGC's actions results in a denial of a protected liberty interest – the interest of the Tribe in its reputation – without due process in violation of the Fifth Amendment to be without merit.

The error in the court's analysis is the assumption that the Tribe was operating in violation of the NIGC regulations when the closure occurred. While many government benefits are subject to withdrawal upon some failure to comply with stated qualifications, this does not mean that the statutory entitlement does not qualify as a protected property interest. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (welfare benefits are statutory entitlement that is protected property right). The Tribe's ultimate complaint is that it is not in violation of any IGRA violations, and thus should have had the opportunity to be

heard and to prove this through an evidentiary hearing prior to a forced closure of the casino. The court only perpetuated the lack of due process by basing its decision on the conclusion, absent a hearing on the issue, that the Tribe is in violation of IGRA. A statutory right, such as the right to operate a business such as a casino, once granted, is a protected property right, and should be protected as such.[5] See Frost v. Corp. Comm'n of State of Oklahoma, 278 U.S. 515, 519-21, 49 S. Ct. 235, 73 L. 3d 483 (1929) (Statutory right to operate a cotton gin business is protected property right under Fifth Amendment).

CONCLUSION

For the foregoing reasons, Appellants Homer Bear Jr. and Renetta Plander respectfully requests this Court reverse the order entered by the district court dismissing their Application for Temporary Restraining Order or Stay of Administrative Action and remand this case for a decision on the merits.

[5] The present situation is distinguishable from that presented in Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (1994). In that case the question was whether the Tribe has a liberty and property interest in gaming prior to the state's agreement to enter into a compact. Id. at 1025. In the case at bar, the State of Iowa has already entered into a compact with the Tribe, effectively determining that the Tribe is qualified to conduct gaming.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Brief was served upon counsel, listed below, by facsimile and by depositing copies in the U.S. Mail, postage pre-paid, in an envelope addressed to the following counsel on the ____ day of _____, 2003.

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CERTIFICATE OF FILING

The undersigned hereby certifies that the original and ten (10) copies of the attached foregoing Appellant's Brief, along with a 3 ½ inch computer diskette containing the full document in Microsoft Word, was filed with Mr. Michael Gans, Clerk of Court, Thomas F. Eagleton Court House, Room 24.329, 111 S. 10th Street, St. Louis, Missouri 63102 on the _____ day of _____, 2003.

The diskette has been scanned for viruses by current available software and that such scan showed the diskette is virus free.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Eight Circuit Rule 28A(c) and (d), that the Plaintiffs'-Appellants' principal brief contains 4654 words of proportional spaced typeface drafted in Microsoft Word. This Brief is submitted pursuant to FRAP 32(a)(7)(B).

Dated this _____ day of _____, 2003.

BY:_____
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